

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON DIVISION**

<b>Jonathan R., minor, by Next Friend, Sarah DIXON, <i>et al.</i>,</b>	)	
	)	
	)	
	)	
Plaintiffs,	)	Class Action
	)	3:19-cv-00710
v.	)	
	)	
<b>Jim JUSTICE, in his official capacity as the Governor of West Virginia, <i>et al.</i>,</b>	)	
	)	
	)	
	)	
Defendants.	)	

**DECLARATION OF MARCIA ROBINSON LOWRY IN SUPPORT OF NAMED  
PLAINTIFF CHILDREN’S MOTION FOR CLASS CERTIFICATION AND  
APPOINTMENT OF CLASS COUNSEL**

I, Marcia Robinson Lowry, declare the following:

1. I am Executive Director of the non-profit organization A Better Childhood, Inc. (“ABC”), an advocacy organization devoted to helping reform child welfare systems on behalf of abused and neglected children. I am co-counsel for Jonathan R., minor, by Next Friend, Sarah Dixon; Anastasia M., minor, by Next Friend, Cheryl Ord; Serena S., minor, by Next Friend, Sarah Dixon; Theo S., minor, by Next Friend, Scott Briscoe; Garrett M., minor by Next Friend, Scott Briscoe; Gretchen C., minor, by Next Friend, Cathy L. Greiner; Dennis R., minor, by Next Friend, Debbie Stone; Chris K., Calvin K. and Carolina K., minors, by Next Friend, Katherine Huffman; Karter W., minor, by Next Friend, Scott Briscoe; Ace L., minor, by Next Friend, Isabelle Santillion; and, individually and on behalf of a class of all others similarly situated (“Plaintiff Children”) in the above-captioned matter. I submit this Declaration in support of Plaintiff Children’s Motion for Class Certification and Appointment of Class Counsel.

2. The proposed class consists of children who are now or will be in foster care in the custody of the West Virginia Department of Health and Human Resources (“DHHR”), Bureau for Children and Families (“BCF”), and three subclasses consisting of: (1) children who have or will have physical, intellectual, cognitive, or mental health disabilities (the “ADA Subclass”); (2) children who are or will be in kinship placements, or who were in kinship placements that unnecessarily disrupted, for whom DHHR is required to provide initial home safety assessments, case management and other services, and permanency planning (the “Kinship Subclass”); and (3) children who are or will be fourteen years old and older, who are eligible to receive age-appropriate transition planning but are not provided the necessary case management and services and are therefore at risk of aging out of foster care without a proper plan to transition successfully and safely into adulthood (the “Aging Out Subclass”).

**A. Adequacy of Class Counsel**

3. ABC will provide adequate representation to the proposed class in this litigation in conjunction with local counsel.

4. A Better Childhood is a non-profit legal organization that represents foster children in class action litigation against states, cities, and counties. *See Ashley W. v. Holcomb*, No. 3:19-cv-129 (S.D. Ind. filed June 26, 2019); *Wyatt B. v. Brown*, No. 6:19-cv-00556 (D. Or. filed Dec. 9, 2019); *Elisa W. v. The City of New York*, 15-cv-5273 (S.D.N.Y. filed Dec. 28, 2015); *M.D. v. Abbott*, 907 F.3d 237, 288 (5th Cir. 2018) (listing Ms. Lowry and A Better Childhood as co-counsel in opinion largely sustaining trial court injunction against Texas child welfare system); *Olivia Y. v. Barbour*, No. 3:04CV251LN, 2016 WL 11609575, at \*1 (S.D. Miss. May 6, 2016) (listing Ms. Lowry as A Better Childhood counsel in awarding fees for child welfare litigation against the state of Mississippi).

5. I am the Executive Director of A Better Childhood. For more than forty years, I have litigated and directed litigation of class action child welfare reform cases alleging claims similar to those alleged by Plaintiff Children in the present action. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 549 (2010) (discussing fee award issues in years-long litigation against state of Georgia on behalf of class of 3,000 foster youth, resulting in 30,000 hours of attorney time); *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (approving appointment of Ms. Lowry and co-counsel to represent class of foster youth); *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1326 (D.C. Cir. 1993) (holding class certification proper in systemic litigation for rights of District of Columbia foster children); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 856 (1977) (holding in class action on behalf of foster parents and foster children, that serious faults in New York foster system raised due process concerns). Moreover, I have achieved system-wide federal court settlements in lawsuits asserting significant deficiencies in the child welfare systems of New Jersey (*Charlie H. v. Christie*, No. 99-3678 (D.N.J. filed Aug. 4, 1999)); Tennessee (*Brian A. v. Haslam*, No. 00-445 (M.D. Tenn. Filed May 10, 2000)); Atlanta, Georgia (*Kenny A. v. Perdue*, No. 02-1686 (N.D. Ga. Filed June 19, 2002)); Mississippi (*Olivia Y. v. Barbour*, No. 04-251 (S.D. Miss. Filed Mar. 30 2004)); Michigan (*Dwayne B. v. Snyder*, No. 06-13548 (E.D. Mich. Filed Aug. 8, 2006)); and Oklahoma (*D.G. v. Yarbrough*, No. 08-074 (N.D. Okla. Filed Feb. 13, 2008)).

6. As a result of my extensive experience, I am knowledgeable about the applicable law, both in the Fourth Circuit and in federal courts nationally.

7. Dawn J. Post is the Deputy Director of A Better Childhood. She has over sixteen years of experience in child welfare leading organizations dedicated to children's advocacy and litigation in New York City and has provided trainings and been consulted nationally and

internationally. She is considered an expert in a variety of related subjects, including broken adoptions and post- adoption sibling visitation, and has a unique knowledge of child welfare policies and practice.

8. Allison Mahoney is a Senior Staff Attorney at A Better Childhood. She began her career nine years ago litigating complex commercial matters in federal courts across the country. She has specialized in child welfare litigation for over five years. Prior to joining ABC, Ms. Mahoney was the child sexual abuse and exploitation project attorney at Lawyers for Children, Inc., where she represented children in New York City family court proceedings and appeals.

9. Tavi Unger is a Staff Attorney at A Better Childhood. Prior to joining ABC, Ms. Unger represented workers in affirmative litigation in state and federal court. She later engaged in anti-discrimination litigation on behalf of workers in federal court.

10. ABC, working closely with attorneys from Shaffer & Shaffer, PLLC and Disability Rights West Virginia, has engaged in an in-depth investigation of the child welfare system in West Virginia. Hundreds of attorney hours have been spent meeting with sources knowledgeable about the system, compiling and analyzing relevant facts and documentation and researching and developing legal claims alleged in Named Plaintiff Children's Class Action Complaint for Injunctive and Declaratory Relief. Together, Counsel has reviewed over 13,000 documents, including the case files of each of the nine Named Plaintiff Children, produced by Defendants.<sup>1</sup> Further, we have taken four depositions of current employees of DHHR and BCF and many more are anticipated. Counsel has also retained experts to opine on the significance of adequately staffed child welfare systems with necessary and appropriate placements, adequate and stable programs related to kinship care, aging out, and services and supports for children with

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<sup>1</sup> Defendants did not produce the case files for three Named Plaintiffs: Chris K., Carolina K., and Calvin K., and a motion to dismiss these plaintiffs on the ground of mootness is pending.

disabilities, and to review the case records of Named Plaintiff Children. ABC, along with co-counsel, is fully prepared to prosecute this matter on behalf of the Plaintiff Children in the proposed class.

11. ABC will bring significant experience and expertise to this litigation to provide adequate co-representation to the class.

**B. Expert Reports**

12. Attached hereto as Exhibit 7 is a true and correct copy of the Declarations and Expert Report of Susan Getman, Janet Flory, and Elsa Popchack, dated August 24, 2020.

13. Attached hereto as Exhibit 8 is a true and correct copy of the Declaration and Expert Report of Dr. Nisha Sachdev, dated August 11, 2010.

14. Attached hereto as Exhibit 10 is a true and correct copy of the Declaration and Expert Report of Dr. Elizabeth Aparicio, dated August 10, 2020.

15. Attached hereto as Exhibit 31 is a true and correct copy of the Declaration and Expert Report of Beverly Johnson, dated August 12, 2020.

**C. Deposition Transcripts<sup>2</sup>**

16. Attached hereto as Exhibit 25 is a true and correct copy of the transcript of the 30(b)(6) deposition of Traci Dean, as corporate designee of the West Virginia DHHR, taken on July 22, 2020.

17. Attached hereto as Exhibit 36 is a true and correct copy of the transcript of the 30(b)(6) deposition of Kendra Boley-Rogers, as corporate designee of the West Virginia DHHR, taken on July 2, 2020.

18. Attached hereto as Exhibit 37 is a true and correct copy of the transcript of the

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<sup>2</sup> Defendants' errata sheets are included at the end of each deposition transcript.

30(b)(6) deposition of Carla Harper, as corporate designee of the West Virginia DHHR, taken on June 30, 2020.

**D. Produced Documents**

19. Attached hereto as Exhibit 1 is a true and correct copy of the Kinship Care Strengths Assessment, dated March 2019, bearing Bates number D139302.

20. Attached hereto as Exhibit 2 is a true and correct copy of the Child and Family Services Reviews, by U.S. Department of Health and Human Resources, dated 2017, bearing Bates number D003776.

21. Attached hereto as Exhibit 3 is a true and correct copy of an email from Nancy Exline to Tina Mitchell, dated August 3, 2016, bearing Bates number D062426.

22. Attached hereto as Exhibit 4 is a true and correct copy of the DHHR Semi-Annual Progress Report, dated October 31, 2017, bearing Bates number D057473.

23. Attached hereto as Exhibit 5 is a true and correct copy of the DHHR Summary of Child Welfare & CPS Audits, dated April 10, 2018, bearing Bates number D055679.

24. Attached hereto as Exhibit 6 is a true and correct copy of the DHHR Final Report, West Virginia Child and Family Services Review, dated October 2002, bearing Bates number D003152.

25. Attached hereto as Exhibit 9 is a true and correct copy of West Virginia AFCARS Context Data, bearing Bates number D137680.

26. Attached hereto as Exhibit 11 is a true and correct copy of the DHHR Child and Family Services Plan, 2015 - 2019, bearing Bates number D003987.

27. Attached hereto as Exhibit 12 is a true and correct copy of an email from Chuck Kleine to Amanda McCreary, dated October 3, 2018, bearing Bates number D065304.

28. Attached hereto as Exhibit 13 is a true and correct copy of an email from Jessica Holstein to Janie Cole, dated January 28, 2019, bearing Bates number D068521.

29. Attached hereto as Exhibit 14 is a true and correct copy of the DHHR Initial Design and Implementation Report, 2nd Quarter, dated May 14, 2015, bearing Bates number D058224.

30. Attached hereto as Exhibit 15 is a true and correct copy of DHHR data on Offices or Hotels per Month, bearing Bates number D023537.

31. Attached hereto as Exhibit 16 is a true and correct copy of the DHHR Fourth Annual Progress Report, dated 2018, bearing Bates number D004703.

32. Attached hereto as Exhibit 17 is a true and correct copy of the DHHR Initial Design and Implementation Report, 3rd Quarter, dated August 2015, bearing Bates number D006753.

33. Attached hereto as Exhibit 18 is a true and correct copy of the DHHR 2015 Annual Progress Report, bearing Bates number D005399.

34. Attached hereto as Exhibit 19 is a true and correct copy of the Rural Child Welfare Practice, Follow-Up to the Rural Child Welfare Leaders Meeting, May 2017, dated June 9, 2017, bearing Bates number D065690.

35. Attached hereto as Exhibit 20 is a true and correct copy of the 2019 Memorandum of Understanding Between the State of West Virginia and the United States Department of Justice, dated May 9, 2019, bearing Bates number D066935.

36. Attached hereto as Exhibit 21 is a true and correct copy of the West Virginia 2019 Child and Family Services Plan, bearing Bates number D003816.

37. Attached hereto as Exhibit 22 is a true and correct copy of the DHHR Annual

Progress Services Report 2015, bearing Bates number D049769.

38. Attached hereto as Exhibit 23 is a true and correct copy of the U.S. Department of Health and Human Services Administration for Children and Families West Virginia Child and Family Services Review, dated May 2009, bearing Bates number D003428.

39. Attached hereto as Exhibit 26 is a true and correct copy of DHHR's Average Caseloads by District, dated April 10, 2020, bearing Bates number D137153.

40. Attached hereto as Exhibit 27 is a true and correct copy of an email from Cheryl Salamacha to Tina Mitchell, dated April 1, 2016, bearing Bates number D060617.

41. Attached hereto as Exhibit 28 is a true and correct copy of the DHHR Legislative Audit Report, Child Protective Services, dated November 19, 2019, bearing Bates number D005788.

42. Attached hereto as Exhibit 29 is a true and correct copy of the DHHR Performance Update, dated January 2015, bearing Bates number D064813.

43. Attached hereto as Exhibit 30 is a true and correct copy of the DHHR Statewide Assessment, dated 2008, bearing Bates number D003566.

44. Attached hereto as Exhibit 32 is a true and correct copy of the Agency Review, West Virginia Legislative Auditor Performance Evaluation & Research Division, dated August 2013, bearing Bates number D060062.

45. Attached hereto as Exhibit 33 is a true and correct copy of the Study of Kinship Care Families, dated October 2019, bearing Bates number D005828.

46. Attached hereto as Exhibit 34 is a true and correct copy of the Bureau for Children and Families Crime Identification Bureau Background Checks, Policy Manual, dated March 15, 2015, bearing Bates number D023195.



47. Attached hereto as Exhibit 35 is a true and correct copy of the DHHR Initial Design and Implementation Report, 3rd Quarter, dated August 14, 2015, bearing Bates number D055066.

**E. Other Documents**

48. Attached hereto as Exhibit 24 is a true and correct copy of an email from Philip Peisch to Marcia Lowry, et al., dated June 19, 2020.

Executed this 2nd day of September 2020, at New York, New York.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/s/ Marcia Robinson Lowry  
Marcia Lowry, *admitted pro hac vice*  
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